COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2016AP175-CR
2016AP176

Cir. Ct. Nos. 2015CT681
2015TR1863

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

NO. 2016AP175-CR
STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COURTNEY L. CARNEY,

DEFENDANT-APPELLANT.

NO. 2016AP176
IN THE MATTER OF THE REFUSAL OF COURTNEY L. CARNEY:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COURTNEY L. CARNEY,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Waukesha County: MICHAEL P. MAXWELL, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Courtney L. Carney appeals from his convictions for operating a motor vehicle while under the influence of an intoxicant and refusing a chemical test of his blood, following the circuit court's denial of his motion to suppress evidence related to a seizure.[2] He argues the police officer lacked reasonable suspicion to seize/detain him—which detention led to evidence resulting in his convictions—and, therefore, the circuit court erred in denying his suppression motion. We conclude the court did not err and affirm.

Background

¶2 The State charged Carney with OWI, second offense, and wrongfully refusing a chemical test of his blood. Carney filed a motion to suppress evidence, and the circuit court held a hearing on the motion. The only witnesses to testify were the two officers at the scene of the arrest. The relevant, undisputed facts from their testimony are as follows.

¶3 Officer Roosevelt Mullins, a City of Waukesha police officer, testified that at approximately 3:00 a.m. on February 14, 2015, he performed a traffic stop on a vehicle because of a nonfunctioning "registration light." A

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The Honorable Michael P. Maxwell presided over the trials in both cases and entered both judgments of conviction. The Honorable Neal Nettesheim presided over the suppression hearing and decided the motion to suppress.

second vehicle, which had been traveling in front of the vehicle stopped by Mullins, also pulled over, about twenty feet in front of the first vehicle.

¶4 Mullins spoke with the operator of the first vehicle and suspected she was OWI. He requested a backup officer to aid with field sobriety tests. When the backup officer, Officer Brenna Goodnature,[3] arrived on the scene, Mullins requested she make contact with the operator of the second vehicle "for safety precautions" and to inquire as to why it had stopped. Mullins confirmed he had observed no traffic violations related to the second vehicle, and the driver of that vehicle had pulled over "appropriately," "legally," and in a safe location.

¶5 Goodnature testified she was called to the scene to assist Mullins with his traffic stop and spoke with him upon her arrival. Upon Mullins' request, Goodnature made contact with the driver of the second vehicle, Carney, and inquired as to why he had pulled over. Carney responded that the driver of the first vehicle had been following him and he pulled his vehicle over in order to wait for her. While speaking with Carney, Goodnature observed "an odor of intoxicants emitting from his breath." When Goodnature asked Carney where he was coming from, Carney responded that they had come from a bar in downtown Waukesha, stating it was "possibly Nice Ash but he wasn't certain." Goodnature testified that Carney "said that they had been drinking and he stated that he had one drink." Goodnature believed Carney was possibly intoxicated, so she told him to wait in his vehicle and she would return to speak with him after she finished assisting Mullins with his traffic stop. Goodnature then proceeded to assist

[3] The transcript erroneously identifies the officer as Brenda Goodnature.

Mullins with his investigation of Carney's acquaintance, the driver of the first vehicle.

¶6 After the investigation of Carney's acquaintance was completed, Goodnature conducted field sobriety tests with Carney, which led to his arrest for OWI. Goodnature acknowledged that when she made contact with Carney his speech was "normal" and he had no difficulty handing her his driver's license. She also acknowledged she made no indication in her incident report of Carney having "glassy" eyes.

¶7 The circuit court denied Carney's suppression motion, concluding Goodnature had reasonable suspicion to temporarily detain Carney to investigate him for OWI. Carney appeals the judgments of conviction based on the denial of his motion to suppress.

Discussion

¶8 In reviewing the denial of a motion to suppress, we review de novo the application of undisputed facts to constitutional principles. *See* ***County of Grant v. Vogt***, 2014 WI 76, ¶17, 356 Wis. 2d 343, 850 N.W.2d 253. The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protect citizens against unreasonable seizures.[4] It is reasonable, and hence lawful, for law enforcement to temporarily seize/detain an individual for purposes of performing a brief investigation if under the totality of

[4] Because our supreme court "interpret[s] the Wisconsin Constitution to be coterminous with the United States Constitution in this area," our analysis applies to both constitutions. *See* ***County of Grant v. Vogt***, 2014 WI 76, ¶18 & n.9, 356 Wis. 2d 343, 850 N.W.2d 253.

the circumstances law enforcement has "reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." *See* ***State v. Young***, 2006 WI 98, ¶20, 294 Wis. 2d 1, 717 N.W.2d 729.

¶9 Carney contends that when Goodnature "took and retained his license without any indication that he was free to leave," he was unlawfully seized because Goodnature lacked reasonable suspicion to believe he had violated the law. He asserts the officer "demonstrated her authority by demanding Carney's license, keeping possession of it, and telling him he was not free to leave the scene of a traffic stop that he was not involved in."[5] The State concedes the officer "seized and detained Mr. Carney by requesting he remain at the scene and carrying away his license." We conclude the seizure was lawful because law enforcement had reasonable suspicion that Carney was OWI.

[5] Carney also argues that he was seized when Goodnature "command[ed]" him to produce his driver's license. He cites to no facts in the record showing that Goodnature "commanded" Carney to or "demand[ed]" that he produce his license, much less when such a command or demand occurred. Because Carney fails to cite to the record for factual support of this point, we will not consider it. *See* ***State v. Boshcka***, 178 Wis. 2d 628, 637, 496 N.W.2d 627 (Ct. App. 1992) ("[W]e will not consider arguments unsupported by citations to the record." (citation omitted)). That said, our own review of the transcript from the suppression hearing indicates only one reference to Carney's driver's license:

> [Carney's counsel:] And he … didn't have any trouble handing you his driver's license?
>
> [Officer Goodnature:] No, he did not.

Nothing from this exchange indicates Goodnature "commanded" Carney to turn over his license or "demand[ed]" that he do so; nor does the exchange, or other testimony from the hearing, give any indication that Carney handed his license to Goodnature at any time prior to when Goodnature instructed him to wait in his vehicle; and, as we conclude herein, by that time Goodnature had reasonable suspicion to detain Carney.

¶10 After speaking with the driver of the first vehicle, Mullins suspected that driver was intoxicated, and he called for Goodnature to join him at the scene to serve as backup. Goodnature arrived and, after speaking with Mullins, approached Carney's vehicle due to safety concerns related to the fact Carney had pulled his vehicle to the side of the road and waited, even though he had not been the one stopped by Mullins. Upon making contact with Carney, Goodnature smelled an odor of intoxicants emitting from Carney's breath. Carney admitted to drinking at a bar with his female acquaintance, who was the driver of the first vehicle and had been following Carney. Carney was uncertain as to the bar at which they had been drinking, but stated it was "possibly Nice Ash." It was 3:00 a.m. on a Saturday morning.[6]

¶11 As the circuit court recognized in denying Carney's motion to suppress, this is a close case. We ultimately do agree with the court, however, that law enforcement had reasonable suspicion to temporarily freeze the situation, by temporarily detaining Carney, so Goodnature could investigate the possibility he was OWI. *See* ***State v. Jackson***, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989) ("[I]f any reasonable suspicion of past, present, or future criminal conduct can be drawn from the circumstances, notwithstanding the existence of other inferences that can be drawn, officers have the right to temporarily freeze the situation in order to investigate further.").

¶12 To begin, Carney had not only been driving after consuming at a bar a sufficient amount of alcohol to produce the smell of intoxicants emitting from his breath, but he had been doing so with an acquaintance who Mullins suspected

[6] February 14, 2015, was a Saturday.

of being intoxicated. Carney and his acquaintance had been engaged in a joint venture together—drinking at a bar. It is certainly possible Carney's acquaintance consumed sufficient amounts of alcohol to cause Mullins to suspect her of being intoxicated while Carney consumed only "one drink," as he professed to Goodnature; however, it was also quite possible Carney and his acquaintance consumed more than just one drink. *See* ***State v. Seibel***, 163 Wis. 2d 164, 182, 471 N.W.2d 226 (1991) ("Ordinarily, the mere fact that the defendant's friends were drinking would not constitute evidence of the defendant's drinking. However, it is evidence of the defendant's drinking in [this case] because the defendant and his friends were engaged in a joint venture, to wit, traveling together between taverns on their motorcycles."); *cf.* ***State v. Post***, 2007 WI 60, ¶36 n.13, 301 Wis. 2d 1, 733 N.W.2d 634.

¶13 Additionally, Carney's lack of certainty as to the bar at which he and his acquaintance were drinking adds, if only slightly, to the reasonable suspicion determination. As Carney's trial counsel acknowledged during argument at the suppression hearing, "it's certainly possible that a reason that he couldn't identify what bar he was coming from is that he was too drunk to know." Of course, there could also be innocent reasons why Carney was uncertain as to the bar from which he was coming; however, a reasonable officer is not required to assume an innocent explanation if an inculpatory one also exists. ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996) (stating "police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop").

¶14 As well, it was 3:00 a.m. on a Saturday morning, a time of day and day of the week that lends to the suspicion Carney may have been drinking intoxicants in an amount greater than one might consume at other times of day or

on other days of the week. *See* ***Post***, 301 Wis. 2d 1, ¶36 (time of night "does lend some further credence" to an officer's suspicion of intoxicated driving); *see also* ***State v. Lange***, 2009 WI 49, ¶32, 317 Wis. 2d 383, 766 N.W.2d 551 (concluding the time of day is relevant for an OWI probable cause (or reasonable suspicion) determination and "[i]t is a matter of common knowledge that people tend to drink during the weekend when they do not have to go to work the following morning"). "A reasonable officer certainly would have more reason to suspect [Carney] had been consuming an excessive amount of alcohol based on these facts than if, for example, he had been coming from work or a child's school event at 10 a.m. on a Tuesday." *See* ***State v. Kugler***, No. 2014AP220, unpublished slip op. ¶12 (WI App Sept. 17, 2014), *review denied*, 2015 WI 24, 357 Wis. 2d 722, 862 N.W.2d 604, and *cert. denied*, 135 S. Ct. 2840 (2015).

¶15 We conclude that while this is a close case, under the totality of the circumstances, reasonable suspicion that Carney was OWI existed for law enforcement to temporarily freeze the situation to investigate him.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.